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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RICHARD P. GONZALES, Plaintiff and Appellant, v. CITY OF COLTON, Defendant and Respondent.	E037447 (Super.Ct.No. SCV109504) OPINION

APPEAL from the Superior Court of San Bernardino County. Tara Reilly, Judge. Affirmed.

Law Offices of Sandra L. Noël-Leyva and Sandra L. Noël-Leyva for Plaintiff and Appellant.

Best Best & Krieger, Cynthia M. Germano and John D. Higginbotham for Defendant and Respondent.

Richard P. Gonzales, plaintiff and appellant (hereafter plaintiff), a 23-year employee of the City of Colton Electric Department (Electric Department), sued defendants City of Colton, Tom Clarke, and Jim Earhart (hereafter referred to collectively as defendants or individually by their respective names, except for the City of Colton which we will refer to as the City) on various theories of recovery, including discrimination based on national origin and retaliation for whistle-blowing, after defendants selected Gary Updegraff, another Electric Department employee, to fill a position for which plaintiff had also applied. The trial court granted summary judgment in favor of the City on plaintiff's first, second, and third causes of action for damages based on alleged unlawful employment practices and discrimination. The trial court earlier had sustained without leave to amend the demurrers of defendants Earhart and Clarke to the first cause of action on the ground that they are not individually liable to plaintiff. The trial court had also sustained without leave to amend the demurrer of all defendants to plaintiff's causes of action for defamation and intentional infliction of emotional distress based on plaintiff's failure to file a claim with the City as required under the California Tort Claims Act. After entering judgment in favor of defendants, the trial court also granted the City's motion to recover attorney fees under Code of Civil Procedure section 1038, and Government Code section 12965.

In this appeal, plaintiff challenges each of the trial court's orders, except that sustaining the demurrers of defendant Earhart and defendant Clarke, on various grounds all of which we recount below. We conclude plaintiff's claims are meritless and therefore we will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a complaint for damages on October 31, 2003, against the City, Clarke, and Earhart seeking recovery for purported discriminatory and retaliatory employment practices as well as defamation and intentional infliction of emotional distress. According to the allegations of plaintiff's complaint, comprised of five purported causes of action, defendant Clarke was the director of the City's Electric Department and defendant Earhart was the Electric Department's superintendent of transmission and distribution. Plaintiff alleged, in pertinent part, that he had been employed in the Electric Department since 1980; in January 2000 plaintiff reported to defendant Earhart that line crew supervisor, Dave Wilson, was under the influence of drugs at work; in April 2000 plaintiff and Lupe Rubio, another Electric Department line crew supervisor, complained to the city manager that Wilson was under the influence of drugs while at work; in May 2000, plaintiff and Rubio again complained to the city manager and to the city personnel director, that Wilson was under the influence of drugs while at work, and that Gary Updegraff was operating equipment unsafely and dangerously due to his lack of experience and refusal to take advice from experienced personnel; in July 2000 plaintiff complained to Judy Clarke, a personnel department employee, and also complained to another woman in risk management, that Dave Wilson was under the influence of drugs at work; in July 2002 plaintiff told defendant Earhart

that plaintiff was interested in a position as line crew supervisor,[1] and defendant Earhart said he would not support plaintiff for the position because plaintiff gave false information about Earhart to the city manager;[2] defendant Earhart appointed Gary Updegraff acting line crew supervisor, even though plaintiff had more years of experience and Updegraff had never been a supervisor; in February 2003 plaintiff reported to defendant Clarke that Gary Updegraff was operating unsafely and was a danger to himself and others, and that Updegraff had caused electrical outages as a result of his lack of experience and refusal to listen to more experienced personnel; plaintiff complained to defendant Clarke about Updegraff again on April 3, 2003; and on April 16, 2003, plaintiff learned that Updegraff had been hired to fill the vacant line crew supervisor position "despite the fact that Plaintiff was a Service Crew Supervisor for thirteen years and with 23 years of combined experience and Gary Updegraff had only 15 years of experience with a poor performance record."

Based on the above-noted allegations plaintiff alleged in his first purported cause of action that he was not awarded the line crew supervisor position "based on pretextual reasons" and in retaliation and reprisal for plaintiff having complained about Updegraff to management and having reported to management that Dave Wilson was under the

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[1] The position came open when Dave Wilson resigned after taking a drug test for which the results were positive.

[2] Plaintiff told the city manager that he believed Earhart was warning Wilson that Wilson was slated to be drug tested at work so that Wilson could avoid the test by not reporting for work on the date the test was scheduled.

influence of drugs while working. Plaintiff alleged that defendants' conduct violated state public policy which prohibits retaliating against an employee who has exercised "fundamental and legal rights."

In his second cause of action, plaintiff alleged that he was denied the line crew supervisor position because he is "Mexican American (Hispanic)" and that in awarding the position to Updegraff, a less qualified person, defendants discriminated against plaintiff based on the fact that he is Mexican American. Plaintiff alleged that he had filed a discrimination complaint with the Department of Fair Employment and Housing (DFEH) in July 2003 and DFEH had issued a right-to-sue letter to plaintiff. Plaintiff alleged that he "believes" that evidence that will be "adduced" through investigation and discovery "will indicate that [the City] discriminated, and continues to discriminate against Mexican American (Hispanic) employees, specifically Plaintiff herein."

Plaintiffs third cause of action alleged that the City violated public policy based on the acts of defendants Clarke and Earhart in discriminating against plaintiff and other Mexican Americans by failing to provide them with equal employment opportunities with the City.

In his fourth and fifth causes of action, plaintiff purported to allege theories of recovery based on the torts of defamation and intentional infliction of emotional distress. In particular, plaintiff alleged in his fourth cause of action seeking damages based on purported defamation that a fire had occurred in the City's "Electric Yard" on April 24, 2003, and the fire had destroyed in excess of $1 million in equipment and supplies; the fire was rumored to have been caused by arson; and plaintiff had been "informed by

fellow mechanics and subordinate employees that rumors were circulating in the workplace accusing [plaintiff] of being the arsonist and that employees were commenting 'They're saying its you.'" In his fifth cause of action, plaintiff alleged that by discriminating against him in employment opportunities, retaliating against him based on his whistle-blowing activity, and defaming him, defendants engaged in outrageous conduct intended to cause, and actually causing, plaintiff emotional distress.

Defendants Clarke and Earhart demurred to the first cause of action alleging retaliation in violation of public policy on the ground that the cause of action failed to allege facts sufficient to constitute a cause of action against them as individuals because defendants Clarke and Earhart are not personally liable for the decision to award the line crew supervisor position to Gary Updegraff. All defendants demurred to plaintiff's fourth and fifth causes of action on the ground, among others, that the causes of action failed to allege facts sufficient to constitute a cause of action because plaintiff failed to allege compliance with the claim filing requirement of the California Tort Claims Act set out in Government Code section 945.4. The trial court sustained the demurrers without leave to amend.

On July 30, 2004, the City moved for summary judgment on plaintiff's first, second, and third causes of action that alleged recovery based on purported retaliation for whistle-blowing in violation of public policy and employment discrimination.

In support of that motion, the details of which we recount below, the City presented facts to show that it promoted Gary Updegraff to the line crew supervisor position because he received the highest score in an oral interview conducted by a board

of independent evaluators. In his opposition, the details of which we also recount below, plaintiff did not dispute that Updegraff received the highest score. He claimed however, that the City had not relied on ranking in the oral interview procedure to make past promotion decisions and therefore the process was a pretext to keep plaintiff from getting the job in retaliation for his whistle-blowing activity and because plaintiff is Hispanic. Plaintiff also intimated that Updegraff's score was not legitimate and that it had been influenced by Earhart and Clarke whom plaintiff claimed had connections with the members of the oral interview panel.

The trial court found that the City had rebutted plaintiff's prima facie showing of discrimination and that plaintiff had failed to rebut that showing and thereby create a triable issue of material fact with respect to those theories of recovery. Therefore, the trial court granted summary judgment in favor of the City on the first, second, and third causes of action.

DISCUSSION

1.

ORDER SUSTAINING DEMURRER TO FOURTH AND FIFTH CAUSES OF ACTION

Plaintiff first contends that the trial court erred in sustaining defendants' demurrer to plaintiff's fourth and fifth causes of action for defamation and intentional infliction of emotional distress. Defendants demurred to those causes of action based on plaintiff's failure to allege compliance with the claim filing requirement of the California Tort Claim Act. (Gov. Code, § 900 et seq.) Government Code section 945.4 requires that

before a lawsuit for money or damages may be initiated against a public entity, the plaintiff must submit a written claim to the public entity which the public entity either acts upon or which is deemed rejected by operation of law. The claim must comport with Government Code section 910 which requires, among other things, that the claim show "[t]he date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted." (Gov. Code, § 910, subd. (c).)

Plaintiff attached a copy of the claim he submitted to the City as an exhibit to his complaint. In their demurrer, defendants asserted, among other things, that the claim does not recount the details surrounding the alleged defamation or the alleged intentional infliction of emotional distress set out in plaintiff's fourth and fifth causes of action and therefore plaintiff failed to comply with Government Code section 945.4. The trial court agreed and sustained defendants' demurrer without leave to amend those two causes of action.

Plaintiff contends, as he did in the trial court, that his claim mentions both defamation and intentional infliction of emotional distress as injuries, and therefore comports with the requirements of Government Code section 910. To the extent the claim is deficient, plaintiff further contends that defendants had a duty under Government Code section 910.8 to advise him of the defects.[3] Accordingly, plaintiff contends the trial court erred in sustaining defendants' demurrer to the fourth and fifth causes of action.

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[3] Government Code section 910.8, provides in pertinent part, "If, in the opinion of the board or the person designated by it a claim as presented fails to comply substantially with the requirements of Sections 910 . . . the board or the person may, at any time within

[footnote continued on next page]

We review the trial court's order sustaining defendants' demurrer without leave to amend de novo. "'"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.'" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

We review plaintiff's pleading according to the foregoing principles and begin with the written claim he submitted to the City. That claim states in pertinent part that plaintiff "was subjected to the [*sic*] unlawful employment practices, including, but not limited to, discrimination based on national origin (Hispanic); retaliation; harassment; intimidation; whistle-blowing; violation of public policy; breach of contract, defamation (slander per-se); invasion of privacy; and intentional and negligent infliction of emotional

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[footnote continued from previous page]
20 days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein."

distress. As a consequence of his whistle-blowing efforts described below, [plaintiff] has been targeted for adverse action." The claim then sets out facts regarding events that occurred between January 2000 and June 13, 2003, (the date of the claim). Those events are limited entirely to plaintiff's employment discrimination and retaliation claims. No facts are stated in plaintiff's claim regarding the defamation alleged in his fourth cause of action. That cause of action, as previously noted, alleges that plaintiff was defamed in April 2003 when he learned that rumors were circulating among his fellow employees that suggested plaintiff had caused a fire in the yard of the Electric Department that destroyed equipment, vehicles, and supplies valued at more than $1 million.

The Supreme Court recently discussed the basics a claim must contain in order to comport with the requirements of Government Code section 945.4 in *Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441 (*Stockett*) and explained that, "[Government Code] section 945.4 requires each cause of action to be presented by a claim complying with section 910, while section 910, subdivision (c) requires the claimant to state the 'date, place, and other circumstances of the occurrence or transaction which gave rise to the claim asserted.' If the claim is rejected and the plaintiff ultimately files a complaint against the public entity, the facts underlying each cause of action in the complaint must have been fairly reflected in a timely claim. [Citation.] '[E]ven if the claim were timely, the complaint is vulnerable to a demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim.' [Citation.]" (*Stockett*, *supra*, 34 Cal.4th at p. 447, citing *Nelson v. State of California* (1982) 139 Cal.App.3d 72, 79.)

Because plaintiff's claim does not include any facts regarding the defamation theory of recovery alleged in his fourth cause of action, that theory of recovery is not fairly reflected in plaintiff's written claim and he has failed to comply with the claim filing requirement with respect to that cause of action. Contrary to plaintiff's view, the City was not required under Government Code section 910.8 to advise him of the deficiency in his claim. According to the express language of that section, the obligation to notify the claimant of deficiencies in a written claim arises when the plaintiff submits a claim that is defective. Here, plaintiff did not include any facts in his written claim pertinent to his defamation theory of recovery. With respect to that theory of recovery, plaintiff failed to submit any claim, not merely a deficient one.

Simply put with respect to defamation, "there has been a 'complete shift of allegations . . . involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim.'" (*Stockett, supra,* 34 Cal.4th at p. 447, citing *Blair v. Superior Court* (1990) 218 Cal.App.3d 221, 226.) Therefore, the defamation cause of action is barred based on plaintiff's failure to include facts pertinent to that tort in the claim he submitted to the City under Government Code section 945.4

With respect to plaintiff's fifth cause of action for intentional infliction of emotional distress, defendants demurred not only on the ground that facts pertinent to that theory of recovery were not included in the claim plaintiff filed with the City, but also on the ground that plaintiff had not alleged facts showing the requisite outrageous conduct. The trial court in turn sustained defendants' demurrer to that cause of action on both of

the noted grounds. While we are inclined to agree with plaintiff that the claim is sufficient with respect to the intentional infliction of emotional distress theory of recovery, we need not address that point. In challenging the trial court's ruling in this appeal, plaintiff only addresses the first ground for sustaining defendants' demurrer. He does not address the second ground, namely his failure to allege facts sufficient to state a cause of action for intentional infliction of emotional distress. We construe plaintiff's oversight as an implied concession of the validity of that basis for sustaining defendants' demurrer to plaintiff's fifth cause of action.

Moreover, even if we were to conclude that the trial court erred in sustaining defendants' demurrer to plaintiff's fifth cause of action, we nevertheless would conclude, in light of the City's subsequent motion for summary judgment, that any purported error was harmless. For reasons we explain below, the trial court correctly granted summary judgment in favor of the City on plaintiff's first, second, and third causes of action based on the absence of any triable issue of material fact to support those theories of recovery. Plaintiff's intentional infliction of emotional distress cause of action is based on the conduct alleged in his first, second, and third causes of action. The absence of facts to support those causes of action necessarily disposes of plaintiff's fifth cause of action for intentional infliction of emotional distress. In short, if the trial court erred in sustaining defendants' demurrer to plaintiff's fifth cause of action, that error was necessarily harmless in this case.

2.

ORDER GRANTING SUMMARY JUDGMENT ON THE FIRST, SECOND, AND THIRD CAUSES OF ACTION

We next review the trial court's order granting summary judgment in favor of the City on plaintiff's first, second, and third causes of action. On appeal, we review de novo an order granting summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) The trial court must grant a summary judgment motion when the evidence shows that there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar*, at p. 843.) In making this determination, courts view the evidence, including all reasonable inferences supported by that evidence, in the light most favorable to the nonmoving party. (Code Civ. Proc., § 437c, subd. (c); *Aguilar*, at p. 843.)

A defendant moving for summary judgment has the burden of producing evidence showing that one or more elements of the plaintiff's cause of action cannot be established, or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar*, *supra*, 25 Cal.4th at pp. 849, 850-851, 854-855.) The burden then shifts to the plaintiff to produce specific facts showing a triable issue as to the cause of action or the defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at pp. 849, 850-851.) Despite the shifting burdens of production, the defendant, as the moving party, always bears the ultimate burden of persuasion as to whether summary judgment is warranted. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar*, at p. 850.)

When the plaintiff has alleged employment discrimination and bases the claim on circumstantial evidence, as in this case, courts utilize a three-step process to determine whether the evidence supports an inference of discrimination or whether the moving party, in this case the employer, is entitled to judgment as a matter of law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, 356 (*Guz*), quoting Code Civ. Proc., § 437c, subd. (c).) An employer moving for summary judgment may do so by setting forth competent, admissible evidence to show a legitimate, nondiscriminatory reason for its action. (*Guz*, at p. 357.) Then the employee "ha[s] the burden to *rebut* this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred." (*Ibid*.) "[A] plaintiff's showing of pretext, *combined* with sufficient prima facie evidence of an act motivated by discrimination, *may* permit a finding of discriminatory intent, and may thus preclude judgment as a matter of law for the employer. [Citation.]" (*Guz*, at p. 361.)

A. The City's Showing of Legitimate, Nondiscriminatory Reason

To meet its burden, the City asserted in its separate statement of undisputed material facts that, among other things, the position of line crew supervisor in the Electric Department came open in July of 2002 when Dave Wilson left the City's employ. Superintendent Jim Earhart appointed Gary Updegraff to serve as acting line crew supervisor. Earhart and Tom Clarke, the head of the Electric Department, decided that the permanent line crew supervisor position would be filled by the person whom a panel of raters, comprised of persons outside the City's Electric Department, ranked highest

based on performance in an oral interview conducted by the raters.[4] The City's human resources department coordinated the entire procedure, including selecting the panel of raters, compiling the interview questions, scheduling interviews, and collecting the written evaluations at the conclusion of the interviews. The three raters were Patrick Irwin from the City of Banning's Electric Department, Richard Webber from the City of Glendale's Electric Department, and Bill Smith, a supervisor in the City's Department of Parks and Recreation. Five candidates, including plaintiff and Gary Updegraff, all of whom were then employed in the City's Electric Department, applied for the line crew supervisor position and all five were interviewed for the position by the panel. When the last interview was completed, an employee of the human resources department collected the evaluation forms. All three interviewers ranked Gary Updegraff number one, giving him a total score of 78.667. The interviewers ranked plaintiff number two giving him a total score of 73.333.[5] Based on his ranking, the City promoted Gary Updegraff to line crew supervisor.

The above-noted facts establish a legitimate, nondiscriminatory reason for hiring Updegraff rather than plaintiff, i.e., he received the highest score from the panel of interviewers. Plaintiff did not challenge the evidence the City offered to establish that fact, instead he attempted to show that the interview process or the result of that process,

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[4] The parties use the phrase "oral board" to refer both to the interview process and to the so-called outside raters, i.e., the people who conducted the oral interviews.

[5] The scores of the other three interviewees are not relevant to the issues in this appeal.

or both, were pretexts. Plaintiff therefore had the burden to present evidence on that issue and to show that the City's reason for hiring Updegraff was untrue or a pretext.

B. Plaintiff's Showing of Pretext

"Pretext may be demonstrated by showing '. . . that the proffered reason had no basis in fact, the proffered reason did not actually motivate the [decision], or, the proffered reason was insufficient to motivate [the decision]. [Citation.]' [Citation.]" (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 224, fn. omitted, quoting *Gantt v. Wilson Sporting Goods Co*. (6th Cir. 1998) 143 F.3d 1042, 1048-1049.) "An employee in this situation can not 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee "'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons." [Citations.]' [Citations.]" [Citation.]' [Citation.]" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 75, quoting *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807, quoting *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.)

In opposing the City's summary judgment motion, plaintiff did not dispute that Updegraff received the highest score from the interview panel. Instead, plaintiff asserted, in pertinent part, that the City had not previously used the interview procedure to make promotion decisions. Plaintiff also intimated that Updegraff's score was not the result of an independent interview process but, rather, was the result of a process that Earhart and

Clarke had manipulated in some manner in order to justify the City's decision not to promote plaintiff and thereby to retaliate against him for his whistle-blowing activity and because he is Hispanic.[6] In other words, plaintiff attempted to show that the process was a pretext.

Consistent with his view, plaintiff disputed the City's assertion that Earhart and Clarke had agreed that the line crew supervisor position would be filled by the person whom the outside panel ranked highest based on the oral interview. Plaintiff asserted that both Earhart and Clarke had told plaintiff that Clarke would select the person to fill the line crew supervisor position. Assuming that fact is true and supported by the evidence plaintiff offered in the trial court,[7] standing alone it does not support an inference that the change in procedure was part of a pretext to avoid hiring plaintiff.

Plaintiff also disputed the City's assertion that promoting the highest ranked person was consistent with established precedent and practice within the Electric

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[6] Plaintiff included numerous other factual assertions in his opposition to defendants' summary judgment motion. Although those facts relate to his claimed whistle-blowing activity, and his view that others employed by the Electric Department were unqualified for their positions, the facts are not relevant to the issue in this appeal which in our view is whether plaintiff presented facts to show that the City had not used the interview procedure in the past and that Updegraff's score was not legitimate such that the entire process was a pretext.

[7] Plaintiff supported many of the factual assertions he raised in the trial court only with his own declaration. The City objected to this and other portions of plaintiff's declaration, in particular those offered to support plaintiff's opinion that various members of the Electric Department were not qualified for their positions. The trial court sustained those objections. Plaintiff does not challenge the trial court's rulings on those objections in this appeal.

Department. According to plaintiff, this "case is the first time they have supposedly ever gone with the number one person on the eligibility list."[8] Plaintiff asserted that in a previous situation involving Betty Holder, another Hispanic employee, Clarke had attempted to fill a vacant position with the second ranked person but was forced to hire Holder, the highest ranked person. Again, assuming without actually deciding plaintiff presented admissible evidence to support this assertion, the incident involving Betty Holder actually supports the City's assertion that the interview and hiring procedure had been used in the past. Although plaintiff cited the Holder incident in order to impugn defendant Clarke,[9] the undisputed outcome was that Betty Holder, the person with the highest score in the interview process, was hired for the position in question. That is precisely what occurred with Updegraff – he received the highest score and the City hired him to fill the vacant position.

As further evidence of purported pretext, plaintiff asserted that the City told him they promoted Updegraff because the City was required to promote the highest ranked person, but plaintiff contended there was no such requirement. Plaintiff cited his own declaration to support his assertion that the City was not required to promote the highest ranked person. However, the trial court sustained the City's objection to the admissibility

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[8] To support his assertion, plaintiff cited his Separate Statement of Facts in Dispute (SSFD) and in particular SSFD Nos. 76, 90, and 91, none of which address whether the City had previously promoted the highest ranked person. However, SSFD No. 94 does touch on the issue.

[9] In this regard, plaintiff claims that defendant Clarke wanted to hire the second ranked person, who was his girlfriend at the time and whom he later married.

of the pertinent portion of plaintiff's declaration. Consequently, plaintiff's factual assertion is not supported by any evidence.

Whether defendant Clarke told plaintiff that Clarke would select the person to fill the line crew supervisor position is irrelevant and does not refute the City's showing that consistent with established procedure, the City filled the line crew supervisor position with the person who received the highest score from the panel of outside raters. In short, plaintiff did not refute the City's showing that the interview procedure had been used in the past and was a legitimate, nondiscriminatory method for selecting the person to fill the line crew supervisor position.

The remaining issue we must address is whether plaintiff presented evidence to refute the City's showing that Updegraff legitimately received the highest score in the interview. As previously noted, plaintiff intimated in his response to the City's statement of undisputed material facts, and in his SSFD, that Updegraff's score was not legitimate, but rather was the result of manipulation by defendants Earhart and/or Clarke which in turn was directed at keeping plaintiff from receiving the promotion either because plaintiff was Hispanic or because he had engaged in whistle-blowing.[10] Plaintiff did not dispute that the City's human resources department arranged the oral interviews and handled all the details of that process. Plaintiff asserted, however, that defendants Clarke

[10] Plaintiff also asserted that Updegraff was not qualified for the position of line crew supervisor. Plaintiff's assertion is based on his personal view of the pertinent qualifications and on his personal opinion that Updegraff did not meet those qualifications. The trial court sustained the City's objection to that portion of plaintiff's declaration, a ruling plaintiff does not challenge in this appeal.

and Earhart had input in the process: Clarke suggested to human resources the cities from which panel members should be selected, and Earhart "made his presence known" to the panelists on the day of the interviews both before the interviews started and after they had concluded.

To support the first assertion, plaintiff cited defendant Clarke's deposition, in which he stated that he identified cities that had electric departments comparable to that of the City from which human resources could solicit interview panel members. Clarke also stated that he did not identify a specific person within those departments to serve on the interview panel. Plaintiff's evidence does not support the inference he apparently would have us draw – that defendant Clarke was involved in selecting the individual members of the interview panel.

Plaintiff's other assertion, that Earhart "made his presence known" to the panel members is supported by plaintiff's evidence, namely the declaration of Ed Ficara (another applicant for the line crew supervisor position) and the deposition of defendant Clarke, in which he stated that defendant Earhart spoke with the panel members after "everything was completed" and that "normally depending on the number or how long this thing goes, Earhart would coordinate with HR for things like lunch . . . . So I'm sure that he participated with the panel for lunch or whatever . . . ." However, the fact that Earhart "made his presence known" does not support the inference that plaintiff would have us draw – that Earhart's presence influenced the panel of interviewers to give Updegraff the highest score.

Plaintiff next attempted to refute the legitimacy of Updegraff's score by focusing on the individual interviewers. Although he did not dispute the identity or background of the interview panel members set out in the City's statement of undisputed material facts, plaintiff claimed that one of the members, Bill Smith, was a friend of Earhart's and that the two "do favors for one another"; that Smith, as Director of the City's Parks and Recreation Department, has no technical knowledge of electrical utilities and given that several of the interview questions were very technical, "it was improper to have [Smith] on the panel." Plaintiff also claimed that the panel member from Banning was "a drinking buddy of Updegraff."

Plaintiff cited his own declaration and the deposition of defendant Clarke to support his assertions that Bill Smith is a friend of defendant Earhart and that the Banning panel member was a drinking buddy of Updegraff's. However, because his statements were not supported by any facts, the trial court sustained the City's various objections to the relevant portion of plaintiff's declaration. In particular, plaintiff stated in his declaration that the panel member from Banning "was a drinking buddy of Updegraff" and that plaintiff "knew that Bill Smith was a friend of Earhart and that they did favors for each other so I suspected that the whole interview was a farce." The trial court sustained the City's objection that the statements lacked foundation. Plaintiff simply failed to support either assertion with relevant and admissible evidence. Defendant Clarke stated in his deposition that he did not know whether defendant Earhart knew Bill Smith. Consequently, plaintiff's evidence did not refute the City's showing that the panel was impartial, and thus legitimate.

The only fact supported by plaintiff's evidence is that Bill Smith, as a supervisor in the Parks and Recreation Department, most likely did not have technical knowledge pertinent to the line crew supervisor position. That fact, however, does not support the inference that the interview panel was "a farce." According to the City's evidence, two of the three panel members were employed in the electric departments of other municipalities and therefore did have the requisite technical knowledge. Bill Smith's expertise, as the City pointed out in its reply, was in management, a skill also required of the person who would fill the line crew supervisor position.[11] Plaintiff's evidence does not support either directly or by reasonable inference the factual assertion that the interview panel was comprised of people inclined to do the bidding of defendants Earhart or Clarke rather than to independently and thus legitimately select the best applicant to fill the position.

Plaintiff also purported to dispute the City's factual assertion that panel members were given only the interview questions, the job description, and applications, and were not provided with any other information about the candidates. According to plaintiff this fact is refuted by defendant Earhart's statement during his deposition that he met the interview panel members before the interviews began so that he could introduce himself to them, and then he took them to lunch when the interviews were completed. Plaintiff's

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[11] In its reply points and authorities, the City noted that the interview consisted of 13 questions only three of which "were 'technical' in nature. The other seven questions dealt primarily with managerial issues, on which Bill Smith, an experienced and respected manager at Colton, was certainly qualified to evaluate. [Fns. Omitted.]"

contrary view notwithstanding, that evidence does not support an inference that Earhart said anything or otherwise conveyed to the interview panel any information regarding his personal preference for a particular job applicant. That inference is only suggested when Earhart's deposition testimony is combined with plaintiff's statement in his declaration, that based on plaintiff's experience as member of an interview panel conducted by the City of Banning, the supervisor made it clear which candidate "they 'really liked.'" Specifically, plaintiff stated, "My experience as an interviewer on oral boards in Banning leads me to believe that there is reciprocity between Banning and Colton in choosing the candidate that the department wants. While management does not come right out and say, 'pick this guy', they let you know who they want you to pick by saying things like, 'we sure do like this guy' and then they buy you lunch."

Plaintiff's subjective and unsubstantiated belief regarding a particular fact does not establish the existence of that fact. Simply put, plaintiff did not present any evidence to establish the truth of his belief that defendant Earhart conveyed to the panel that he personally liked Updegraff for the line crew supervisor position.

The remaining fact plaintiff disputed was the City's assertion that at the conclusion of the interviews a member of the human resources department immediately collected the evaluation forms. Plaintiff asserted that the last interviewee, Ed Ficara, did not see anyone from human resources at the interview but as he was leaving, Ficara did see Earhart enter the interview room. Plaintiff asserted this same fact, i.e., that Earhart entered the interview room "to speak with the interviewees when Ed Ficara was leaving"

and that the human resources person, Blanca Arambula, was not present, in his own SSFD, No. 91.

Ed Ficara did state in his declaration, among other things, that he "was the last candidate to be interviewed that day" and did not see anyone from human resources when he left, but as Ficara was leaving he saw defendant Earhart enter the interview room. The fact that Earhart entered the room at the conclusion of the interviews, but before the human resources person arrived and collected the interview evaluation forms, does not support the unarticulated factual inference plaintiff apparently would have us draw – that during the unspecified period of time in which Earhart was alone with the interviewers, either he altered the evaluation forms or he persuaded the interviewers to do so. As with each of plaintiff's other assertions, this inference is completely unsupported by any evidence and, as such, is purely speculation.

In short and simply put, plaintiff failed to present any evidence, least of all the required "'"substantial evidence"'" to "'"'demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons." [Citations.]' [Citations.]" [Citation.]' [Citation.]" (*Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th at p. 75.) Therefore, we must conclude, as did the trial court, that plaintiff failed to refute the City's showing that the selection process was legitimate and rendered a legitimate result. Stated in terms of the City's motion for summary judgment, plaintiff failed to rebut the City's

showing and therefore failed to create a triable issue of material fact on the question of whether the City hired Updegraff rather than plaintiff for a prohibited discriminatory reason or in retaliation for plaintiff's whistle-blowing activity.

C. Plaintiff's Other Evidence of Disparate Impact

As previously noted, in addition to challenging the City's proffered reasons for its decision to hire Updegraff by attempting to show those reasons were merely pretextual, plaintiff also purported to present other evidence of discriminatory motive to refute the City's showing that the decision was legitimate. (*Guz, supra*, 24 Cal.4th at pp. 355-356.) In this regard, plaintiff attempted to show that the City has a history of only promoting "whites" and that practice has resulted in a workforce that does not accurately reflect the percentage of Hispanics in the City's population. In other words, plaintiff attempted to show that the City's practice had a disparate impact on Hispanics.

To establish a prima facie case of employment discrimination based on disparate impact, plaintiff must show that a facially neutral employment practice actually had a "disproportionate adverse effect on members of the protected class." (*Guz, supra*, 24 Cal.4th at p. 354, fn. 20.) To state a disparate impact claim, plaintiff must first identify a specific employment practice engaged in by the employer. (*Watson v. Fort Worth Bank and Trust* (1988) 487 U.S. 977, 994.) "Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."

(*Ibid*.) "[S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation." (*Watson v. Fort Worth Bank and Trust*, at p. 995.)

Plaintiff did not allege or otherwise identify the specific employment practice he claimed results in the purported disparate impact. For that reason alone, he failed to establish any additional acts of discrimination. Because he failed to identify the particular employment practice, plaintiff also failed to show causation. On this issue plaintiff purported to rely on demographic evidence, i.e., the percentage of Hispanics in the population compared to the percentage of Hispanics employed by the City. Such a comparison has an obvious flaw: population figures include children and other people who are not part of the potential workforce. As the Supreme Court explained, in the context of a disparate impact challenge to a hiring practice, "The 'proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.' [Citation.]." (*Wards Cove Packing Co., Inc. v. Atonio* (1989) 490 U.S. 642, 650-651, quoting *Hazelwood School Dist. v. United States* (1977) 433 U.S. 299, 308.) Plaintiff's statistical showing was simply irrelevant.

Because plaintiff failed to make either required showing in his opposition to the City's summary judgment motion, he failed to raise a triable issue of material fact on the question of disparate impact. Therefore, the trial court properly granted summary judgment in favor of the City on that, as well as plaintiff's two other theories of recovery.

3.

ATTORNEY FEES AWARD

After the trial court granted summary judgment in the City's favor, the City filed a motion to recover its attorney fees from plaintiff under Code of Civil Procedure section 1038 and Government Code section 12965. The trial court granted that motion and awarded the City $39,060.50 in attorney fees. Plaintiff challenges that award in this appeal but, in doing so, focuses entirely on Government Code section 12965 which authorizes an award of attorney fees and costs to the prevailing party in any action brought under the California Fair Employment and Housing Act.[12] Plaintiff does not address whether the award is proper under Code of Civil Procedure section 1038 which provides, in pertinent part, that in any civil action brought under the California Tort Claims Act, "If the court should determine that the proceeding was not brought in good faith and with reasonable cause, an additional issue shall be decided as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding, and the court shall render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party." (Code Civ. Proc., § 1038, subd. (a).) Defense costs include reasonable attorney fees. (Code Civ. Proc., § 1038, subd. (b).)

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[12] Government Code section 12965 provides in pertinent part, "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs . . . except where the action is filed by a public agency or a public official, acting in an official capacity."

Because an attorney fees award is discretionary, the standard of review on appeal is abuse of discretion. "'The trial court's decision will only be disturbed when there is no substantial evidence to support the trial court's findings or when there has been a miscarriage of justice. If the trial court has made no findings, the reviewing court will infer all findings necessary to support the judgment and then examine the record to see if the findings are based on substantial evidence.' [Citation.]" (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512.)

In its order granting the City's attorney fees motion, the trial court found that plaintiff "has never had any credible or relevant evidence to support his retaliation, race discrimination and public policy claims. [Plaintiff] absolutely, positively cannot come to grips with the fact that he was not the most well qualified person for the job. He clearly believes he's the greatest employee the City of Colton has and has ever had. He cannot accept at all that he isn't. [Plaintiff's] resulting belief that the only reason he didn't get this job must be because he is Hispanic is simply an unacceptable basis for filing a lawsuit. As more fully explained in the Court's ruling on [the City's] summary judgment motion, [plaintiff's] case was based on unsubstantiated allegations and inadmissible hearsay. For example, [plaintiff's] allegation that one of the oral board panelists was a 'drinking buddy' of Gary Updegraff is nothing more than a wild accusation, and there has never been even a hint of evidence to support it. Likewise, [plaintiff's] allegation that Jim Earhart tampered with [the City's] random drug testing program is an unbelievably egregious accusation to make with absolutely, positively no foundation for it whatsoever. Similarly, there was no evidence that Dave Wilson and Gary Updegraff were never drug

tested, or that they were under the influence all the time. To the contrary, the evidence was that [the City] followed policy and ultimately got rid of Mr. Wilson. [Plaintiff's] complaints about this are not objectively reasonable. Jim Earhart's alleged statement that he would not support [plaintiff for the line crew supervisor position] suggests, if anything, that Earhart had lost confidence in [plaintiff], not that Earhart was retaliating against him. Having made very damaging and perhaps even criminal allegations against Mr. Earhart without any objective information that the allegations were even remotely true, there is no objectively reasonable basis for believing that there was race discrimination or retaliation."[13]

Plaintiff, as previously noted, contends that the attorney fees award is not warranted under Government Code section 12965, but he does not address the propriety of either the fact or the amount of that award under Code of Civil Procedure section 1038. Because he does not raise the issue, we need not address it and instead may conclude the attorney fees award is proper under Code of Civil Procedure section 1038. As set out above, an award of attorney fees under Code of Civil Procedure section 1038 is proper when the court finds that the action was not brought in good faith and with reasonable cause. The trial court made those findings, as set out above, and plaintiff does

[13] The order is included in the City's motion to augment the record on appeal which we granted with respect to that order and the order granting the City's summary judgment motion. We reserved ruling on two other items included in the motion to augment, which both are excerpts from depositions, and we designated those excerpts documents 4 and 5 in our order. Defendants' request to augment the record on appeal to include documents 4 and 5 is hereby denied.

not challenge them in this appeal. Accordingly, we must conclude that the trial court did not abuse its discretion and we affirm the attorney fees award.

DISPOSTION

The judgment is affirmed. Defendant City of Colton to recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.